

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Robert Eliason,

Plaintiff

Case No.: 2:17-cv-03017-JAD-DJA

v.

Clark County and State of Nevada ex rel.
Nevada Commission on Peace Officer
Standards and Training,

Defendants

**Order Lifting Stay; Granting Defendant's
Motions to Vacate Preliminary Injunction
and Dismiss; Denying Plaintiff's Motion to
Modify Preliminary Injunction; and
Denying Defendants' Motion for Summary
Judgment**

[ECF No. 75, 76, 77, 84]

North Las Vegas Constable Robert Eliason sues Clark County and the State of Nevada's Commission on Peace Officer Standards and Training (POST Commission) for attempting to remove him from office after he failed to become a POST-certified category II peace officer, as required by Nevada Revised Statute 258.007.¹ After Eliason received a preliminary injunction in state court that prevented his removal from office,² and his dispute was removed to this court, I certified a state-law question to the Nevada Supreme Court, asking it to resolve whether NRS § 258.007's forfeiture provision for lack of certification is self-executing or whether Eliason could be removed from office only through a judicial proceeding.³ After that Court held that NRS § 258.007's forfeiture provision is self-executing, the County moved to dissolve the preliminary injunction and dismiss Eliason's suit, while the Commission renewed its motion for summary

¹ ECF No. 1 (complaint).

² ECF No. 42-3.

³ ECF No. 71.

1 of the position.⁹ The Nevada Legislature tasked the POST Commission with certifying officers
 2 and adopting “regulations establishing minimum standards for the certification” of “peace
 3 officers,” including regulations establishing “requirements for basic training for category I,
 4 category II, and category III peace officers.”¹⁰ These certification requirements are enshrined in
 5 Nevada’s Administrative Code, and the POST Commission must “award a basic certificate to
 6 any peace officer who” meets certain requirements, including passing “the state physical fitness
 7 examination for the appropriate category of peace officer.”¹¹ That physical-fitness examination
 8 requires a category II officer to be able to jump a certain height, perform several pushups, run or
 9 walk a certain distance, finish a timed agility test, and “complete not less than 29 sit-ups in 1
 10 minute.”¹² The administrative code also permits “[a]ny administrator of an agency” to “petition
 11 the Commission for a waiver of any provision of this chapter on behalf of an officer.”¹³

12 In the summer of 2015, Eliason began preparing for the state’s physical-fitness test to
 13 become peace-officer certified.¹⁴ But he found that he could not perform parts of the fitness test
 14 because of his disability, which he characterizes as a “neurological condition.”¹⁵ Recognizing
 15 that he might miss the statutory-certification deadline because he couldn’t pass the physical-
 16 fitness test, Eliason sought and received a six-month extension, pushing out his certification

18 ⁹ *Id.* at § 258.007(3); *see also Clark Cnty. v. Eliason*, 468 P.3d 817, 819 (Nev. 2020) (“We
 19 conclude NRS 258.007(2)’s plain language makes the forfeiture self-executing where the
 constable fails to timely certify as a category II peace officer.”).

20 ¹⁰ Nev. Rev. Stat. §§ 289.510(c), (c)(1).

21 ¹¹ *Id.* at § 289.200(1).

22 ¹² *Id.* at § 289.205(2)(a)–(f).

23 ¹³ *Id.* at § 289.370.

¹⁴ ECF No. 77-1 at 14.

¹⁵ ECF No. 1 at ¶ 14.

1 deadline until June 2016.¹⁶ But he continued to struggle with the physical-fitness requirements
2 of the certification process and failed to become a certified peace officer in the time allotted.¹⁷
3 So the POST Commission notified the Clark County Board of Commissioners of this failure and,
4 a year later, the Assistant County Manager placed an item on the agenda for the Board's July 18,
5 2017, meeting, which proposed declaring that Eliason had forfeited his office.¹⁸

6 But before the Board could vote, Eliason sued Clark County and the POST Commission
7 in state court, seeking injunctive and declaratory relief, and asserting that the defendants'
8 attempted enforcement of NRS § 258.007 was unconstitutional and unlawful.¹⁹ At the time,
9 Eliason's suit turned on whether the defendants could enforce NRS § 258.007's forfeiture clause
10 or whether his removal from office could only occur through an NRS § 35.010 writ-quo-
11 warrant action.²⁰ Once the state court entered a preliminary injunction, Eliason amended his
12 complaint to add an ADA claim, which prompted the defendants to remove the suit to this
13 court.²¹

14 After Eliason moved for declaratory judgment, I determined that his case presented a
15 novel issue of state law, which I certified to the Nevada Supreme Court under Nevada Rule of
16 Appellate Procedure 5.²² I stayed the suit and denied the parties' then-pending motions, until the
17 High Court's resolution of whether NRS § 258.007's forfeiture provision was self-executing,
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19 ¹⁶ *Id.* at ¶¶ 19–20.

20 ¹⁷ *Id.* at ¶¶ 22–23.

21 ¹⁸ *Id.* at ¶¶ 31–32.

22 ¹⁹ *See generally*, ECF No. 1.

23 ²⁰ *Id.* at ¶¶ 34–46.

²¹ ECF Nos. 1; 41 at 8–11.

²² ECF No. 71.

1 required a writ-quo-warranto action, or could be enforced by the County or POST
 2 Commission.²³ Roughly one year later, the Nevada Supreme Court ruled that the “plain
 3 language of NRS 258.007 provides that a constable must become POST-certified and the failure
 4 to do so works a forfeiture of the office,” meaning that neither the County nor the Commission
 5 has “the authority” or “need to declare a forfeiture because that forfeiture occurs automatically
 6 upon the constable’s failure to timely certify as a category II peace officer.”²⁴

7 The County now moves to vacate the preliminary injunction.²⁵ It also seeks to dismiss
 8 the complaint, and the Commission moves for summary judgment, with both defendants largely
 9 arguing that the Nevada Supreme Court’s decision nullifies Eliason’s suit.²⁶ But Eliason
 10 opposes those motions and seeks to modify the preliminary injunction, claiming that his suit now
 11 turns on whether enforcement of NRS § 258.007 violates the ADA.²⁷

12 Discussion

13 I. Preliminary injunction [ECF Nos. 75, 84]

14 Federal Rules of Civil Procedure 54(b) and 60(b)(5) permit a district court to modify
 15 interlocutory orders before entry of a final judgment.²⁸ “A party seeking modification or
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17 ²³ *Id.*

18 ²⁴ *Eliason*, 468 P.3d at 820.

19 ²⁵ ECF No. 75.

20 ²⁶ ECF Nos. 76, 77.

21 ²⁷ ECF No. 84.

22 ²⁸ Fed. R. Civ. P. 54(b) (“[A]ny order or other decision . . . that adjudicates fewer than all the
 23 claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time
 before the entry of a judgment”); Fed. R. Civ. P. 60(b)(5) (“On motion and just terms, the
 court may relieve a party . . . from a final judgment, order, or proceeding [if] . . . the judgment
 has been satisfied, released, or discharged; it is based on an earlier judgment that has been
 reversed or vacated; or applying it prospectively is no longer equitable”); *see also Credit*
Suisse First Bos. Corp. v. Grunwald, 400 F.3d 1119, 1123 (9th Cir. 2005) (“[A] district judge

dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction.”²⁹ However, “[a] motion to modify or dissolve an injunction cannot be used to challenge the imposition of the original injunction.”³⁰ While both the County and Eliason agree that the Nevada Supreme Court’s decision changes this suit’s landscape, they disagree as to the extent of that alteration. According to the County, the High Court’s decision requires dismissal of Eliason’s claims;³¹ to Eliason, it only closed off one path among many and did not affect his ADA claim.³²

The Nevada Supreme Court’s decision obviates the basis for this suit’s preliminary injunction, warranting its dissolution. In its order granting the preliminary injunction, the state-court judge reasoned that “a [q]uo [w]arranto action is the exclusive remedy to obtain a declaration that a forfeiture of public office has occurred by provisions of law, including that in NRS 258.007.”³³ Noting that Eliason would likely succeed on the merits of his suit protesting the defendants’ attempts to remove him from office absent that action, that court enjoined the County and Commission “from proceeding during the pendency of this action in voting on or declaring the forfeiture” of Eliason’s post or “filling any vacancy in the Office of Constable . .

always has power to modify or to overturn an interlocutory order or decision while it remains interlocutory.”) (internal quotation marks omitted).

²⁹ *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) (quoting *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) (internal quotation marks omitted)).

³⁰ *United States ex rel. F.T.C. v. Bus. Recovery Servs. LLC*, 488 F. App’x 188, 189–90 (9th Cir. 2012) (unpublished).

³¹ ECF Nos. 75, 76.

³² ECF No. 84. It is entirely unclear whether Eliason believes that his constitutional claims may proceed.

³³ ECF No. 42-3 at 6.

1 . unless such vacancy is declared [by] a Nevada court in writ quo warranto.”³⁴ But the High
2 Court held that NRS § 258.007’s forfeiture provision was automatic and any further proceedings
3 taken by the defendants had no effect on Eliason’s status as constable because he has already lost
4 the position by failing to become POST certified.³⁵ Thus, not only has the legal basis for the
5 preliminary injunction vanished, but the injunction no longer provides Eliason with a remedy
6 because he has already forfeited his position—regardless of the defendants’ votes, declarations,
7 or attempts to fill the vacancy. So I vacate the preliminary injunction.

8 While Eliason characterizes his motion as one to modify the preliminary injunction, he
9 does not argue that the Nevada Supreme Court’s order warrants revision to the preliminary
10 injunction. Instead, he invokes the standards for issuing a new injunction, arguing that he is
11 likely to succeed on the merits of his ADA claim and will suffer irreparable harm if I permit the
12 defendants to enforce “NRS 258.007’s physical agility requirement.”³⁶ Eliason cites no
13 precedent requiring me to weigh the factors laid out in *Winter v. Natural Resources Defense*
14 *Council, Inc.*, which govern the issuance of a preliminary injunction,³⁷ in deciding whether to
15 modify an already-established injunction. But even if I must do so, I find that modification of
16 the preliminary injunction in this case is unwarranted.

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18 ³⁴ *Id.* at 7.

19 ³⁵ *Eliason*, 468 P.3d at 819 (“Here, however, POST certification is an eligibility requirement, and
20 unless the constable contests POST’s determination—which Eliason does not do here—judicial
proceedings are unnecessary to determine whether the constable has met that statutory
requirement for holding office.”).

21 ³⁶ ECF No. 84 at 3.

22 ³⁷ *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013) (“A plaintiff who
23 seeks a preliminary injunction must show: (1) that he is likely to succeed on the merits, (2) that
he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of
equities tips in his favor, and (4) that an injunction is in the public interest.” (quoting *Winter v.*
Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (internal quotation marks omitted)).

As discussed below, Eliason is unlikely to succeed on the merits of his claims: (1) the Supreme Court’s decision obviates the legal basis for his request for injunctive and declaratory relief; (2) his ADA claim is inadequately pled; and (3) his requested remedies are largely unavailable, given that neither the County nor the Commission have the power to enforce, or refrain from enforcing, NRS § 258.007. Eliason appears to concede as much, failing to even discuss the merits of any claim aside from the alleged ADA violations.³⁸ This alone warrants dismissal.³⁹ But I am also not persuaded that Eliason is likely to suffer irreparable injury without preliminary relief because enjoining the Commission and County from “taking any action to remove or replace Constable Eliason”⁴⁰ would not affect the forfeiture of his position, which has already occurred.⁴¹ Because Eliason has failed to make a showing on either of these elements, I decline to consider the remaining *Winter* elements,⁴² deny his motion to modify the injunction, and dissolve it.

II. Motions to dismiss and for summary judgment [ECF Nos. 76, 77]

The focus of Eliason’s suit has changed considerably since its initial filing. In his motion for declaratory judgment, Eliason claimed that the “gravamen of this action” was whether the County had the “power to remove a sitting, duly-elected constable from office.”⁴³ But he now

³⁸ ECF No. 84.

³⁹ *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013) (“Further, when we agree with the district court that a plaintiff has failed to show the likelihood of success on the merits, we ‘need not consider the remaining three [*Winter* elements].’” (citation omitted) (alterations in original)).

⁴⁰ ECF No. 84 at 10.

⁴¹ *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (“At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm.”).

⁴² *Harris*, 729 F.3d at 944.

⁴³ ECF No. 41 at 1–2.

1 claims that the “central issue in this case is that NRS [§] 258.007 violates Title II of the
 2 Americans with Disabilities Act and its attendant regulations.”⁴⁴ This substantive shift can be
 3 traced to the Nevada Supreme Court’s clarifying decision in *Clark County v. Eliason*, which
 4 largely nullified the basis of his complaint because it held that neither defendant in this case had
 5 the power to remove Eliason from office because his forfeiture was automatic.⁴⁵ In light of that
 6 ruling, the County moves to dismiss this action and the Commission renews its motion for
 7 summary judgement, arguing that Eliason’s suit cannot proceed as a matter of law.

8 Nevada’s High Court’s ruling has left the parties’ motions and briefing in some disarray.
 9 At the outset, Eliason’s requests for declaratory and injunctive relief⁴⁶ to prevent “Clark County
 10 from usurping the jurisdiction to adjudicate whether [he] has forfeited his office”⁴⁷ were
 11 foreclosed by the Nevada Supreme Court’s holding that he automatically forfeited his position
 12 by failing to become POST certified. Accordingly, his request that I “issue a writ of prohibition
 13 prohibiting or enjoining Clark County from usurping the jurisdiction to adjudicate whether
 14 Constable Eliason has forfeited his office”⁴⁸ is moot. Eliason also fails entirely to address
 15 whether his constitutional claims may proceed in light of the Supreme Court’s ruling, which
 16 implicitly blessed the “specific qualifications necessary to holding the office, such as educational
 17 requirements or physical condition requirements.”⁴⁹ And, as both defendants argue and Eliason

19 ⁴⁴ ECF No. 81 at 2.

20 ⁴⁵ *Eliason*, 468 P.3d at 820.

21 ⁴⁶ Eliason labels these his first and second “claim[s] for relief.” ECF No. 1 at 5–6.

22 ⁴⁷ *Id.* at ¶ 46.

23 ⁴⁸ *Id.*

⁴⁹ *Eliason*, 468 P.3d at 818. In his initial opposition to the Commission’s summary-judgment motion, which he incorporates by reference in his renewed opposition, Eliason makes no mention and offers no defense of his constitutional claims. *See* ECF Nos. 66, 83.

1 largely concedes, Eliason’s remedies are now also moot: the Nevada Supreme Court already
2 divested the County of the “jurisdiction” to remove him, and further removal proceedings are
3 toothless because Eliason has already forfeited his position. So I dismiss those claims and
4 requests for relief.

5 Nor am I convinced that Eliason’s ADA claim can survive based on his complaint.
6 Under the ADA, “no qualified individual with a disability shall, by reason of such disability, be
7 excluded from participation in or be denied the benefits of the services, programs, or activities of
8 a public entity.”⁵⁰ The United States Supreme Court recognizes both ADA-based disparate-
9 treatment claims—which turn on whether a protected trait motivated an employer’s decision to
10 treat some people less favorably—and disparate-impact claims—which involve “employment
11 practices that are facially neutral in their treatment of different groups but that in fact fall more
12 harshly on one group than another and cannot be justified by business necessity.”⁵¹ While
13 conceding that the statute is facially neutral,⁵² Eliason nonetheless argues that “NRS [§] 258.007
14 discriminated against [him] on the basis of disability in violation of Title II of the ADA” by
15 requiring him to meet POST-certification requirements.⁵³

16 But as the County points out, and Eliason declines to address, the statute, the County, and
17 the Commission are not responsible for the enforcement of NRS § 258.007.⁵⁴ Eliason also
18 seemingly conflates NRS § 258.007’s certification requirements with NAC § 289.200(1)’s
19 physical fitness requirements, arguing that “NRS [§] 258.007’s physical agility requirement
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21 ⁵⁰ 42 U.S.C. § 12132.

22 ⁵¹ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

23 ⁵² ECF No. 84 at 6.

⁵³ ECF No. 1 at ¶ 52.

⁵⁴ ECF No. 85 at 3.

Given the convoluted nature of these proceedings, however, I find that the interests of justice warrant giving Eliason permission to amend his complaint.⁵⁷ So I grant the County's motion to dismiss, dismiss Eliason's complaint without prejudice, and grant him leave to amend his complaint to re-assert his ADA-based and constitutional claims in light of the Nevada Supreme Court's ruling. And because I dismiss Eliason's complaint, I deny the Commission's motion for summary judgment as moot.

IT IS THEREFORE ORDERED that **THE STAY** pending the Nevada Supreme Court's resolution of the certified question [ECF No. 71] **is LIFTED**.

IT IS FURTHER ORDERD that the County's motion to vacate the order granting a preliminary injunction [ECF No. 75] is **GRANTED** and the **preliminary injunction in this matter is DISSOLVED**.

⁵⁶ Nev. Admin. Code § 289.200(1).

⁵⁷ *Carrico v. City & Cnty. of S.F.*, 656 F.3d 1002, 1008 (9th Cir. 2011).

1 IT IS FURTHER ORDERED that the County's motion to dismiss **[ECF No. 76]** is
2 **GRANTED**. Plaintiff Eliason's complaint is dismissed without prejudice and with leave to
3 amend.

4 IT IS FURTHER ORDERED that the Commission's renewed motion for summary
5 judgment **[ECF No. 77]** is **DENIED without prejudice**.

6 IT IS FURTHER ORDERED that Eliason's motion to modify the preliminary injunction
7 **[ECF No. 84]** is **DENIED**.

8 IT IS FURTHER ORDERED that Eliason is directed to file his second amended
9 complaint alleging any ADA-based and constitutional claims by March 15, 2021. If he fails to
10 do so, this case will be dismissed with prejudice.

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U.S. District Judge Jennifer A. Dorsey
Dated: March 3, 2021
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